SUPREME COURT, U. S.

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JAMES R. BROWNING, Clerk

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1961

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**No. 380**

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ELOF HANSSON, INC.,
*Petitioner*

v.

UNITED STATES,
*Respondent*

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**Petition for a Writ of Certiorari to the United States Court of Customs and Patent Appeals**

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**Petition for a Writ of Certiorari to the United States Court of Customs and Patent Appeals**

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Elof Hansson, Inc., petitioner herein, prays that a writ of certiorari issue to review the judgment of the United States Court of Customs and Patent Appeals, entered in the above entitled case on December 22, 1960.

## CITATIONS TO OPINIONS BELOW

The opinion of a single judge of the United States Customs Court sitting in reappraisement (R. 76) is reported in 41 Cust. Ct. 519. The opinion of the Appellate Term of the United States Customs Court (R. 98) is reported in 43 Cust. Ct. 627. The opinion of the United States Court of Customs and Patent Appeals, printed in Appendix B hereto, *infra*, p. B3, is reported in Treasury Decision Advance Sheets, Vol. 96, No. 24, June 15, 1961, p. 71.

## JURISDICTION

The judgment of the United States Court of Customs and Patent Appeals was entered on December 22, 1960. *Infra*, p. B-2. Rehearing was denied on June 5, 1961. *Infra*, p. B-9. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

## QUESTION PRESENTED

Whether failure to publish notice of proposed rule making in the Federal Register as required by Section 4(a) of the Administrative Procedure Act renders invalid a finding of dumping made by the Secretary of the Treasury under the Antidumping Act of 1921.

## STATUTES INVOLVED

Sections 4(a) and 10(e) of the Administrative Procedure Act of 1946, 60 Stat. 238-239, 5 U.S.C. §§ 1103 and 1009 printed in Appendix A, *infra*, p. A-1. Section 201(a) of the Antidumping Act of 1921, 42 Stat. 11, 19 U.S.C. § 160 (1952 edition), printed in Appendix A, *infra*, p. A-2. Public Law 85-630, 72 Stat. 583, amending Section 201(b) of the Antidumping Act of 1921, printed in Appendix A, *infra*, p. A-3.

## STATEMENT

The Secretary of the Treasury commenced a dumping investigation on about March 31, 1953 in accordance with the provisions of Section 201 of the Antidumping Act of 1921 with respect to hardboard imported from Sweden. (R. 11.) Notice of the dumping investigation was not published in the Federal Register as required by Section 4(a) of the Administrative Procedure Act. (R. 16-17.) Petitioner herein received actual notice of the dumping investigation on about May 5, 1953, and participated in

that investigation. (R. 12.) Thereafter, the Acting Secretary of the Treasury made and published a finding of dumping with respect to hardboard from Sweden on August 26, 1954 (R. 77), following which the Appraiser of Merchandise at New York determined the "foreign market value" and "purchase price" of the entry at bar under the provisions of the Antidumping Act of 1921. (R. 78.) Petitioner duly filed an appeal for reappraisement by a single judge of the United States Customs Court (R. 79), whereupon that court acquired jurisdiction under 28 U.S.C. Section 1582. Objection to the Secretary's failure to publish notice of proposed rule making was first raised by petitioner at the trial of the appeal for reappraisement.

Judge Rao, sitting as a single judge of the Customs Court in reappraisement, found that the Administrative Procedure Act did not apply to the function of the Secretary of the Treasury under the Antidumping Act of 1921, and thus sustained the value found by the appraiser. (R. 93.) Upon application for review duly taken, the Appellate Term of the Customs Court reversed the judgment below and held: (1) that the requirements of the Administrative Procedure Act are applicable to proceedings leading to a finding of dumping under the Antidumping Act of 1921; (2) that the Secretary of the Treasury in making a finding of dumping is an "agency" within the meaning of the Administrative Procedure Act; (3) that a finding of dumping is "rule making" within the meaning of the Administrative Procedure Act; and (4) that failure to publish notice of such proposed rule making in the Federal Register as required by the Administrative Procedure Act renders the finding of dumping invalid. (R. 112.)

Upon appeal duly taken to the United States Court of Customs and Patent Appeals, the judgment of the Appellate Term below was reversed. The C.C.P.A. rejected

as bases of decision the questions considered controlling by the Appellate Term below, and instead saw the "fundamental and underlying issue" as:

> "Did appellee [petitioner herein], having actual notice of the pendency of the investigation . . . and having participated actively and without objection in the investigation preceding the finding of dumping, thereby waive its right to rely upon the asserted procedural irregularity to nullify the finding of dumping?" (Appendix B, *infra*, pp. B-3, B-4)

Addressing itself to the question thus posed, the court held:

> "The view we take of this case is, therefore, that it is not necessary to pass here on the applicability of the A.P.A. to antidumping investigations under the Antidumping Act of 1921 . . . . We . . . hold on the authority of the *Tucker* decision [*United States* v. *Tucker Truck Lines*, 344 U.S. 33] that the procedural irregularities which appellee asserts arose from the failure of the Secretary of the Treasury to publish the notice required by Section 4 of the A.P.A. was a procedural irregularity which the appellee has waived by participating in the antidumping investigation without making timely objection to the Secretary of the Treasury." (Ibid., pp. B-6, B-7.)

## REASONS FOR GRANTING THE WRIT

1. The summary manner in which the C.C.P.A. decided the instant case presents a significant departure from the analysis which this Court indicated for the decision of such cases in *United States* v. *Tucker Truck Lines*, thus giving rise to an important conflict of principle. This Court, in *Tucker*, held[1] that a defect in the appointment of an I.C.C. hearing examiner, resulting from a failure to comply with the Administrative Pro-

[1] Mr. Justice Frankfurter and Mr. Justice Douglas dissenting. Appendix C, *infra*, pp. C-5 and C-7.

cedure Act, was "not one which deprives the Commission of power or jurisdiction, so that even in the absence of timely objection its order should be set aside as a nullity." (Appendix C, *infra*, p. C-5.) This Court thus indicated in plain terms that there can be procedural defects resulting from failure to comply with the Administrative Procedure Act of such a serious nature that they may be asserted to nullify administrative action whether or not objection was made before the agency below, and consequentially that a determination of whether the defect complained of rises to such dignity is essential to the decision of such cases. The court below expressly declined to determine, or even consider, that indispensable question and instead held, in effect, that whether or not the agency's procedural omission was jurisdictional, petitioner had "waived" its right to complain by having had actual notice of the proposed rule making and having failed to make timely objection. It is indeed startling to learn that a jurisdictional defect may be waived by an affected party, and that the limitations on agency action imposed by the Administrative Procedure Act are within the dispensing power of a litigant.

2. There exists a direct conflict among several Federal circuits on one of the main questions of law presented by the instant case, viz., whether an agency rule not formulated or issued in compliance with the publication requirements of the Administrative Procedure Act is valid as to a party having actual notice of the rule.

The decision of the court below is in direct conflict with the decision of the Ninth Circuit Court of Appeals in *Hotch* v. *United States*, 212 F. 2d 280 (9th Cir., 1954) (Appendix C, *infra*, p. C-8), which held that failure to publish a regulation as required by the Administrative Procedure Act renders the regulation a nullity, despite actual notice of its content by the person charged, and despite the fact that he first objected to the procedural

irregularity by petition for rehearing to the Court of Appeals. In turn, the Ninth Circuit is in direct conflict with the District of Columbia and Tenth Circuits. In *Eastern Air Lines, Inc.* v. *Union Trust*, 221 F. 2d 62 (D.C. Cir., 1955) (Appendix C, *infra*, p. C-15), *rev'd on other grounds* 350 U.S. 907, *original holding adhered to* 239 F. 2d 25, *cert. denied* 353 U.S. 942, the District of Columbia Circuit held that failure to adhere to the publication requirements of the Administrative Procedure Act does not render a regulation invalid as to an affected party who had actual notice. The Tenth Circuit has held that when parties affected have actual notice and participate in a hearing which results in the affirmance of a prior order which was not issued in accord with the publication requirements of the Administrative Procedure Act, such parties may not challenge the validity of the subsequent order on the ground of failure to publish notice. *Amerada Petroleum Corp.* v. *Federal Power Commission*, 231 F. 2d 461 (10th Cir., 1956) (Appendix C, *infra*, p. C-24.)

These three cases and the case at bar, although arising under differing circumstances, present the same question of law and decide it in a conflicting manner.

3. The question presented by this petition is of manifest importance to the operation of the Administrative Procedure Act. Jurisdictional defect in agency rule making is in reality a question of scope of delegation of legislative powers and the point at which encroachment by the executive on the legislature begins. The doctrine that inheres in the instant decision would permit the notice requirements of the Administrative Procedure Act to be "waived," without careful weighing of whether rule making without the statutory notice rises to an impermissible overstepping by the agency of delegated powers. The decision below puts the stamp of appellate approval on, and indeed invites, administrative agencies to formu-

late rules in reliance upon actual notice rather than upon the public notice contemplated by Section 4(a) of the Administrative Procedure Act. Whether such a grave departure from the intended effect of the Administrative Procedure Act should be tolerated is, it is believed, properly a matter of concern for this Court.

Nor does the fact that the Antidumping Act of 1921 was amended in 1958[2] to require the Secretary of the Treasury to publish notice of dumping investigations in the Federal Register moot the issue presented here. The question arises, not under the customs laws, but under the Administrative Procedure Act, and its resolution affects rule making by all the many agencies subject to that Act.

It is also to be noted that the instant case arose as a test case, the outcome of which will control the disposition of 396 appeals for reappraisement now pending before the Customs Court.

4. It is believed that the decision below is erroneous in that it holds that whatever right petitioner had to object to the procedural irregularity, it waived by having actual notice and by participating in the investigation without then objecting, irrespective of whether the failure to publish notice of proposed rule making rendered the resulting finding of dumping *ultra vires*. The error is doubly egregious in view of Section 10(e) of the Administrative Procedure Act, which requires that:

> "(e) So far as necessary to decision and where presented the reviewing court shall . . . (B) hold unlawful and set aside agency action, findings, and conclusions found to be . . . (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law;" (Appendix A, *infra*, p. A-1.)

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[2] For convenience, the text of that amendment is set out in Appendix A, *infra*, p. A-3.

If, as we believe, the omission of publication of notice of proposed rule making constitutes such a serious departure from the mandatory requirements of the Administrative Procedure Act as to deprive the Secretary of the Treasury of jurisdiction, then it is a novel proposition, indeed, that a litigant may "waive" an unlawful encroachment by the executive upon the legislature.

## CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

JAMES R. SHARP
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Washington 6, D. C.
*Counsel for Petitioner*

Date: September 1, 1961

## APPENDIX A

*Section 4(a), Administrative Procedure Act*

§ 1003. *Rule Making*

Except to the extent that there is involved (1) any military, naval, or foreign affairs function of the United States or (2) any matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts—

*Notice, publication and contents*

(a) General notice of proposed rule making shall be published in the Federal Register (unless all persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law) and shall include (1) a statement of the time, place, and nature of public rule making proceedings; (2) reference to the authority under which the rule is proposed; and (3) either the terms or substance of the proposed rule or a description of the subjects and issues involved. Except where notice or hearing is required by statute, this subsection shall not apply to interpretative rules, general statements of policy, rules of agency organization, procedure, or practice, or in any situation in which the agency for good cause finds (and incorporates the finding and a brief statement of the reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

*Section 10(c), Administrative Procedure Act*

§ 1009. *Judicial review of agency action*

Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion.

• • • •

*Scope of review*

(e) So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 1006 and 1007 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error.

*Section 201(a), Antidumping Act of 1921*

SEC. 201. (a) Whenever the Secretary of the Treasury (hereinafter in this Act called the "Secretary"), after such investigation as he deems necessary, finds that an industry in the United States is being or is likely to be injured, or is prevented from being established, by reason of the importation into the United States of a class or kind of foreign merchandise, and that merchandise of such class or kind is being or is likely to be sold in the United States or elsewhere at less than its fair value, then he shall make such finding public to the extent he deems necessary, together with a descrip-

tion of the class or kind of merchandise to which it applies in such detail as may be necessary for the guidance of the appraising officers.

*Public Law 85-630*

AN ACT

To amend certain provisions of the Antidumping Act, 1921, to provide for greater certainty, speed and efficiency in the enforcement thereof, and for other purposes.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That Section 201 of the Antidumping Act, 1921, (19 U.S.C. 160) is amended as follows:

• • •

(2) By striking out "he shall forthwith authorize" in subsection (b) and inserting in lieu thereof "he shall forthwith publish notice of that fact in the Federal Register and shall authorize."

## APPENDIX B

### UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS

Wednesday, October 12, 1960

At a session of said court continued and held at the city of Washington, pursuant to adjournment, on this 12th day of October, A. D. 1960.

Present the Honorable Eugene Worley, Chief Judge, and the Honorables Giles S. Rich, I. Jack Martin, and Arthur M. Smith, Associate Judges, and the Honorable William H. Kirkpatrick, United States Senior Judge for the Eastern District of Pennsylvania.

The court was opened for business in due form.

* * * * * * * *

Customs Appeal No. 5032

THE UNITED STATES,

*Appellant*

v.

ELOF HANSSON, INC.,

*Appellee*

Said appeal came on to be heard before the court and after hearing the arguments of counsel on behalf of the Government and Robert C. Keck as amicus curiae and counsel for the importer the cause was taken under advisement by the court. Appellee granted three weeks to file supplemental brief and appellant granted two weeks to reply.

# UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS

Thursday, December 22, 1960

At a session of said court continued and held at the city of Washington, pursuant to adjournment, on this 22nd day of December, A. D. 1960.

Present the Honorable Eugene Worley, Chief Judge, and the Honorables Giles S. Rich, I. Jack Martin, and Arthur M. Smith, Associate Judges, and the Honorable William H. Kirkpatrick, United States Senior Judge for the Eastern District of Pennsylvania.

The court was opened for business in due form.

* * * * * * * * *

Customs Appeal No. 5032

THE UNITED STATES,

*Appellant*

v.

ELOF HANSSON, INC.,

*Appellee*

Said appeal having heretofore been brought on to be heard before the court and due consideration thereon having been had, it is—

ORDERED that the judgment of the United States Customs Court be, and the same is hereby, reversed, and said cause is remanded to said court for further proceedings consistent with the views expressed in the opinion of this court herein.

* * * * * * * * *

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[Date of Decision: Dec. 22, 1960]

UNITED STATES COURT OF
CUSTOMS AND PATENT APPEALS

October Term 1960

Customs Appeal No. 5032

THE UNITED STATES,

*Appellant*

v.

ELOF HANSSON, INC.,

*Appellee*

SMITH, Judge.

The single judge Customs Court in Reap. Dec. 9212 sustained the determination of the Acting Secretary of the Treasury (89 Treas. Dec. 197, T.D. 53567) made pursuant to the Antidumping Act of 1921 (19 U.S.C. 160) that "the industry manufacturing hardboard[1] in the United States is likely to be injured by reason of the importation into the United States of hardboard from Sweden, and that hardboard from Sweden is being sold and is likely to be sold in the United States at less than its fair value." The judgment of the trial court was reversed by the Third Division, Appellate Term (A.R.D. 114) and the present appeal was taken.

The Appellate Term stated the primary issue to be "whether the Administrative Procedure Act (5 USC § 1001, June 11, 1946, ch. 325; 60 Stat. 237 as amended) applied to findings of dumping made under the Antidumping Act of 1921." The trial court held that the

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[1] Hardboard is a hard, dense board made from wood fibers interfelted and compressed under heat and pressure. (This footnote added.)

Administrative Procedure Act[2] did not apply while the Appellate Term held that it did.

It is our opinion, however, that the stated issue is not the primary issue requiring decision. The fundamental and underlying issue as we see it is: Did appellee, having actual notice of the pendency of the investigation by the Secretary of the Treasury under the Antidumping Act of 1921; and having participated actively and without objection in the investigation preceding the finding of dumping, thereby waive its right to reply upon the asserted procedural irregularity to nullify the finding of dumping?

The facts pertinent to a determination of this issue are that the antidumping investigation, which lasted one and one-half years and culminated in the presently challenged finding of dumping, originated in a petition dated March 31, 1953, which was filed with the Secretary of the Treasury by the Hardboard Association as representative of all, but three, of the domestic manufacturers of hardboard.

Within a month after filing the petition, Mr. Geller, an Examiner of Merchandise from the office of the Appraiser of Merchandise, contacted representatives of appellee and informed them of the petition, told them that the Secretary of the Treasury was making an investigation, solicited information in the form of analytical data, and invited appellee's participation in the proceedings. Appellee participated in the proceedings and supplied data to Mr. Geller under a cover letter dated May 5, 1953.

The testimony also establishes that from April 20, 1953, and extending through the spring and summer of 1953, there were numerous conferences between a Mr. Weitzel, Assistant to the Assistant Secretary of the

[2] Hereinafter referred to as the A.P.A.

Treasury, and the importers of Swedish hardboard, including appellee, concerning the investigation. These conferences sometimes involved the importers and sometimes their attorneys, as well as representatives from the foreign embassies and from the domestic industry. Information was communicated both in verbal discussions and in writings. The exhibits here include a letter dated June 29, 1953, from appellee to the Commissioner of Customs, containing a request for a copy of the Hardboard Association's petition. Another letter is one dated June 30, 1953 from the attorneys for appellee requesting an opportunity to be heard and to submit evidence, should the bureau find that a "*prima facie* case of dumping is established." There was an extensive correspondence by appellee's attorneys directed to the Customs Bureau with respect to the investigation.

On August 21, 1953, while the investigation was pending, appellee purchased the merchandise, the appraisement of which is here in issue. On October 13, 1953, the Acting Commissioner of Customs issued a letter authorizing all appraisers to withhold appraisements of entries of Swedish hardboard, and to issue the Customs Form 6459 Notice of Withheld Appraisement.[3] Copies of this notice were sent to appellee and to the collector.

On December 3, 1953, appellee's merchandise was entered, and appellee acquiesced without objection to withholding the appraisement after receipt of notice thereof on Customs Form 6459. Approximately nine months later, the investigation was completed and the Acting Secretary, on August 26, 1954, made the finding of dumping which was published in the Federal Register on September 3, 1954 (19 F.R. 5631). Shortly thereafter, on September 9, 1954, notice of appraisement was

[3] Form 6459 contains the following statement: "Appraisement is being withheld on * * * pending investigation as to whether or not the said merchandise is being imported in violation of the Antidumping Act of 1921."

sent to appellee, who soon thereafter instituted the present action.

No notice of the investigation was published in the Federal Register. However, all of the importers of Swedish hardboard whose merchandise was either awaiting appraisement on, or was entered subsequent to, October 13, 1953, received Customs Form 6459 notices.

In addition, the testimony indicates that the importers, embassies and domestic producers received actual notice of the petition and that they actively participated in the investigation from the outset. At no time during the course of the entire investigation was any issue raised before the Secretary, either directly or through the Customs Bureau, of any procedural irregularities in the investigation based on alleged non-compliance with the A.P.A. provisions requiring the publication in the Federal Register of notice of "rule making" proceedings.

The best interests of orderly procedure require that if any right or interest of appellee were infringed or even endangered by the procedure followed in the investigation, appellee should have made timely objection thereto.

The only asserted procedural irregularity in the antidumping investigation here in issue is the failure, based on appellee's theory that the finding of dumping was "rule making," of the Secretary of the Treasury to publish notice of the proceeding in the Federal Register as required by Section 4 of the A.P.A.

These facts seem to us to bring the present case squarely within *United States* v. *Tucker Truck Lines*, 344 U.S. 33. It is our opinion that the *Tucker* decision clearly requires that the issue here sought to be raised should have been raised by timely objection at the administrative level. Appellee's position here is aptly characterized, in the words of the *Tucker* decision as

being "clearly an afterthought, brought forward at the last possible moment to undo the administrative proceedings without consideration of the merits and [which] can prevail only from technical compulsion irrespective of considerations of practical justice." (*Id.* p. 36.)

Applicable here, is the rationale of the *Tucker* case, as stated by the Supreme Court, that

> Courts should not topple over administrative decisions unless the administrative body not only has erred but has erred against objection made. (*Id.* p. 37.)

The view we take of this case is, therefore, that it is not necessary to pass here on the applicability of the A.P.A. to antidumping investigations under the Antidumping Act of 1921. We dismiss, on the authority of the *Tucker* decision, appellee's argument that the procedural irregularity resulted in the loss of agency jurisdiction so that the order is totally void. The holding in the *Tucker* case is directly contrary to appellee's position that the procedural irregularity here was converted into a jurisdictional irregularity.

Appellee relies heavily upon the decision in *Hotch* v. *United States* (C.A. 9th) 208 F.2d 244 (1953), petition for rehearing granted, 208 F.2d 249, petition for rehearing denied, 212 F.2d 280 (1954), to support its position. We think the *Hotch* case is clearly distinguishable and is, therefore, not controlling here.

In the *Hotch* case, as distinguished from the instant situation, Hotch had no opportunity to object to the procedures followed by the Secretary of the Interior prior to the criminal action against him. Hotch had no notice of and did not participate in the "rule-making" hearings. The issue upon which our decision turns, viz., whether a participant in administrative proceedings can raise a procedural objection for the first time on appeal to the courts, was never before the court in the *Hotch*

case and, therefore, was not decided. Thus that case is not pertinent in determining the matters here in issue.

We, therefore, hold on the authority of the *Tucker* decision that the procedural irregularities which appellee asserts arose from the failure of the Secretary of the Treasury to publish the notice required by Section 4 of A.P.A. was a procedural irregularity which appellee has waived by participating in the antidumping investigation without making timely objection to the Secretary of the Treasury.

The view we take of this issue makes it unnecessary to pass upon either the issue of applicability of the A.P.A. to an antidumping investigation under the Antidumping Act of 1921 or the issue of whether or not the finding of dumping was "rule making" as defined in the A.P.A. and leaves for our consideration only the issue based on appellee's contention that the Secretary erred in finding that the domestic hardboard industry would be "injured" by the imports of Swedish hardboard.

The specific language placed in issue by this contention is found in Section 201(a) of the Antidumping Act of 1921, as follows:

> (a) Whenever the Secretary of the Treasury (hereinafter called the "Secretary"), after such investigation as he deems necessary, finds that an industry in the United States is being or is likely to be injured, or is prevented from being established, by reason of the importation into the United States of a class or kind of foreign merchandise, and that merchandise of such class or kind is being sold or is likely to be sold in the United States or elsewhere at less than its fair value, then he shall make such finding public to the extent he deems necessary, together with a description of the class or kind of merchandise to which it applies in such detail as may be necessary for the guidance of the appraising officers.

It is appellee's contention that when Congress used the word "injured" in the said section it meant "destroyed." It is fatal to appellee's position on this issue that it has produced neither evidence as to the construction placed upon the word "injured" by the Secretary nor evidence to indicate what the Secretary found with respect to the effects of the imports upon the domestic industry.

In this connection, appellee directs the attention of the court to a report of the Tariff Commission on the hardboard industry, made at the request of the Senate Committee on Finance for certain information. Appellee suggests that we either accept the Tariff Commission's findings as those of the Secretary or reevaluate the evidence to make our own findings.

In *Kleberg & Co. (Inc.)* v. *United States*, 21 CCPA 110, T.D. 46446 (1933), this court, after a review of the pertinent cases, said:

> * * * we are not at liberty here to go into an investigation as to whether the facts shown on the trial below justified the issuance of the order complained of. Under the statute, the Secretary was not confined to any particular source of information or means of investigation. Furthermore, such information as he might obtain was not open to public inspection, unless he felt that the public interest so required. *Norwegian Nitrogen Products Co.* v. *United States*, 20 C.C.P.A. (Customs) 27, T.D. 45674, affirmed in 288 U.S. 294.
>
> The judgment is *reversed*.

is *reversed*.

*REVERSED*

# UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS

Monday, June 5, 1961

At a session of said court continued and held at the city of Washington, pursuant to adjournment, on this 5th day of June, A.D. 1961.

Present the Honorable Eugene Worley, Chief Judge, and the Honorables Giles S. Rich, I. Jack Martin, and Arthur M. Smith, Associate Judges, and the Honorable William H. Kirkpatrick, United States Senior Judge for the Eastern District of Pennsylvania.

The court was opened for business in due form.

* * * * * * * * *

Customs Appeal No. 5032

THE UNITED STATES,

*Appellant*

v.

ELOF HANSSON, INC.,

*Appellee*

Appellee having duly filed petition for rehearing and due consideration thereon having been had, it is—

ORDERED that said petition be, and the same is hereby, denied.

* * * * * * * * *

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# APPENDIX C

UNITED STATES OF AMERICA and Interstate Commerce Commission,
*Appellants*

v.

L. A. TUCKER TRUCK LINES, INC.

Mr. Justice Jackson delivered the opinion of the Court.

One Cunningham applied to the Interstate Commerce Commission for a certificate of public convenience and necessity to authorize extension of his existing motor carrier route.[1] A railroad and eleven motor carriers, including appellee, intervened to oppose. The issues were referred to an examiner who after hearing recommended that, with exceptions not material here, a certificate be granted. Appellee excepted, whereupon Division 5 of the Commission, in substance, approved the recommendation. Appellee requested reconsideration by the full Commission, which was denied, and then petitioned for "extraordinary relief," which also was refused. The Commission thereupon issued a certificate to Cunningham. Appellee upon the ground that the evidence did not show need for the additional transportation service, petitioned the District Court to set aside the certificate and order. The Commission and the United States answered and a three-judge court was convened.

On the day appointed for hearing, appellee moved for leave to amend its petition to raise, for the first time, a contention that the Commission's action was invalid for want of jurisdiction because the examiner had not been appointed pursuant to § 11 of the Administrative Procedure Act.[2] The District Court allowed amendment and,

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[1] 49 USC § 307.

[2] 5 USC § 1010.

upon proof that the appointment had not been in accordance with that Act, invalidated the order and certificate without going into the merits of the issue tendered in the original complaint.[3] This appeal by the United States and the Interstate Commerce Commission raises but a single question—whether such an objection, first made at that stage of the proceedings, was not erroneously entertained. We hold that it was.

Appellee did not offer nor did the court require any excuse for its failure to raise the objection upon at least one of its many opportunities during the administrative proceeding. Appellee does not claim to have been misled or in any way hampered in ascertaining the facts about the examiner's appointment. It did not bestir itself to learn the facts until long after the administrative proceeding was closed and months after the case was at issue in the District Court, at which time the Commission promptly supplied the facts upon which the contention was based and sustained.

The apparent reason for complacency was that it was not actually prejudiced by the conduct or manner of appointment of the examiner. There is no suggestion that he exhibited bias, favoritism or unfairness. Nor is there ground for assuming it from the relationships in the proceeding. He did not act and was not expected to act both as prosecutor and judge. The Commission, which appointed him, did not institute or become a party in interest to the proceeding. Neither it nor its examiner had any function except to decide justly between contestants in an adversary proceeding. The issue is clearly an afterthought, brought forward at the last possible moment to undo the administrative proceedings without consideration of the merits and can prevail only from technical compulsion irrespective of considerations of practical justice.

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[3] 100 F. Supp. 432.

In Riss & Co. v. United States, 341 US 907, 95 L. ed 1345, 71 S. Ct. 620, this Court held that officers hearing applications for certificates of convenience and necessity under § 207(a) of the Interstate Commerce Act are subject to the provisions of the Administrative Procedure Act.[4] But timeliness of the objection was not before us, because in that case the examiner's appointment had been twice challenged in the administrative proceedings, once, as it should have been, before the examiner at the hearings and again before the Commission on a petition for rehearing. That decision established only that a litigant in such a case as this who does make such demand at the time of hearing is entitled to an examiner chosen as the Act prescribes.

We have recognized in more than a few decisions,[5] and Congress has recognized in more than a few statutes,[6] that orderly procedure and good administration require that objections to the proceedings of an administrative agency be made while it has opportunity for correction in order to raise issues reviewable by the courts. It is urged in this case that the Commission had a predetermined policy on this subject which would

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[4] Our decision in the Riss Case was announced after the administrative proceeding herein, but before the District Court's hearing. Riss apparently prompted appellee to raise the point about the examiner's qualifications in the District Court.

[5] Spiller v. Atchison, T. & S. F. R. Co. 253 US 117, 130, 64 L. ed 810, 819, 40 S. Ct. 466; United States ex rel. Vajtauer v. Commissioner of Immigration, 273 US 103, 113, 71 L. ed. 560, 566, 47 S. Ct. 302; United States v. Northern Pacific R. Co., 288 US 490, 494, 77 L. ed 914, 917, 53 S. Ct. 406; Unemployment Compensation Com. of Alaska v. Aragon, 329 US 143, 155, 91 L. Ed. 136, 145, 67 S. Ct. 245.

[6] Section 9(a) of the Securities Act of 1933, 15 USC § 77(i); § 25(a) of the Securities Exchange Act of 1934, 15 USC § 78(y); § 24 of the Public Utility Holding Company Act, 15 USC §79(x); § 10 of the Fair Labor Standards Act, 29 USC § 210; § 10(e) of the National Labor Relations Act, 29 USC § 160(e).

have required it to overrule the objection if made. While this may well be true, the Commission is obliged to deal with a large number of like cases. Repetition of the objection in them might lead to a change of policy, or, if it did not, the Commission would at least be put on notice of the accumulating risk of wholesale reversals being incurred by its persistence.[7]

Simple fairness to those who are engaged in the tasks of administration, and to litigants, requires as a general rule that courts should not topple over administrative decisions unless the administrative body not only has erred but has erred against objection made at the time appropriate under its practice.

It is argued, however, that this case falls outside of this general rule and the result below is technically compelled because, if the appointment of the hearing examiner was irregular, the Commission in some manner lost jurisdiction and its order is totally void. This inference is drawn from our decision in Wong Yang Sung v. McGrath, 339 US 33, 94 L ed 616, 70 S Ct 445, for it is contended we could not have sustained a collateral attack by writ of habeas corpus in that case unless we found the defect in that examiner's appointment to be one of jurisdictional magnitude. We need not inquire what should have been the result upon that case had the Government denied or the Court considered whether the objection were sustained was taken in time. The effect of the omission was not there raised in briefs or argument nor discussed in the opinion of the Court. There-

[7] The Government informs us that in about five thousand cases commenced after the effective date of the Administrative Procedure Act, orders are for an indefinite period vulnerable to attack if no timely objection during the administrative process is required. The policy of the Commission is to grant application for rehearing in cases where applicant made the objection before the examiner. Since its established practice is not to consider issues not raised before the examiner, it will refuse rehearings in other cases.

fore, the case is not a binding precedent on this point.[8] Even as to our own judicial power or jurisdiction, this Court has followed the lead of Mr. Chief Justice Marshall who held that this Court is not bound by a prior exercise of jurisdiction in a case where it was not questioned and it was passed sub silentio.[9]

The question not being foreclosed by precedent, we hold that the defect in the examiner's appointment was an irregularity which would invalidate a resulting order if the Commission had overruled an appropriate objection made during the hearings. But it is not one which deprives the Commission of power or jurisdiction, so that even in the absence of timely objection its order should be set aside as a nullity.

The judgment is reversed and the cause remanded to the District Court for determination on the merits.

Mr. Justice Frankfurter, dissenting.

Were we dispensing what is complacently called oriental justice, according to which the merits of the individual case alone, so one is told, determine the result, I would join my brethren in reversing this judgment. For I see no reason to disagree with the Court's view that in this case noncompliance by the Interstate Commerce Commission with the requirements of the Administrative Procedure Act did not prejudice the appellee. Nor do I deny that some rights personal to a party may be waived, either explicitly or by failure to assert them.

But I find no explicit waiver here, nor is it clear to me how the appellee can be charged with knowledge of

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[8] Webster v. Fall, 266 US 507, 69 L. ed. 411, 45 S. Ct. 148.

[9] United States v. More (US), 3 Cranch 159, 172, 2 L. ed. 397, 401; Snow v. United States, 118 US 346, 354, 30 L. ed. 207, 209, 6 S. Ct. 1059; Cross v. Burke, 146 US 82, 87, 36 L. ed. 896, 898, 13 S. Ct. 22; Louisville Trust Co. v. Knott, 191 US 225, 236, 48 L. ed. 159, 163, 24 S. Ct. 119; United States ex rel. Arant v. Lane, 245 US 166, 170, 62 L. ed. 223, 224, 38 S. Ct. 94.

the official status of the examiner on the basis of whose report the Commission took action adverse to it. In any event, the requirement of the Administrative Procedure Act that proceedings which lead to an administrative adjudication must be conducted by an independent hearing examiner is not something personal to a party. It is a requirement designed to assure confidence in the administrative process by defining and limiting the various organs through which that process is allowed to function.

I do not use the term "jurisdiction" because it is a verbal coat of too many colors. But we are dealing with legislation which sought to remedy what were believed to be evils in the way in which administrative agencies exercised their authority prior to the enactment of the Administrative Procedure Act of June 11, 1946. That Act accordingly prohibited the commingling of the conflicting functions exercised by these agencies. I do say, therefore, that it created unwaivable limitations upon the power of these agencies, as much so as do the definitions in judiciary acts of the different categories of cases which different courts are empowered to hear and decide. The limitations upon the power of the Interstate Commerce Commission to act, imposed by the command that it must do so only in accordance with the requirements of the Administrative Procedure Act, are thus not within the dispensing power of any litigant. They bind and confine the Commission itself.

I cannot otherwise read what we decided in Wong Yang Sung v. McGrath, 339 US 33, 94 L ed 616, 70 S Ct 445, and Riss & Co. v. United States, 341 US 907, 95 L ed 1345, 71 S Ct 620. I do not rest my conclusion on any assumption of jurisdiction sub silentio in the Wong Yang Sung Case. What I am resting on is the significance we attached to the requirement of independent hearing examiners as inherent in the process of administrative adjudication.

After we decided Wong Yang Sung v. McGrath (US) supra, Congress was promptly asked to relieve the deportation process of this requirement and it did so. See Chapter III of The Supplemental Appropriations Act, 1951 (Act of September 27, 1950, Pub L No. 843). After we made the same ruling as to the Interstate Commerce Commission, Congress was promptly asked to validate proceedings previously conducted by the Commission in disregard of the requirements for independent hearing examiners. Congress has chosen not to enact such remedial legislation.[1] I do not construe this want of action as controlling upon the issue before us. I refer to this subsequent legislative history merely as an indication of the path by which undesirable consequences flowing from our decision in Riss & Co. v. United States (US) supra, may be corrected without injustice. Situations like this arise from time to time when decisions of this Court in the observance of law suggest corrective legislation. See e.g., United States v. Heinszen & Co. 206 US 370, 51 L ed 1098, 27 S Ct 742, 11 Ann Cas 688.

Mr. Justice Douglas, dissenting.

This decision gives a capricious twist to the law. One would assume from a reading of the opinion in Wong Yang Sung v. McGrath, 339 US 33, 94 L ed 616, 70 S Ct 445, that the failure of a federal agency to use the type of examiner prescribed by Congress in the Administrative Procedure Act, 60 Stat 327, 5 USC §§ 1001 et seq., vitiated the proceedings whether objection was raised or not. The Congress decided to separate the judicial functions of examiners from the investigative and prosecuting functions. It required the separation in cases involving property interests as well as those involving personal liberty. It condemned as unfair a practice

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[1] A remedial bill was successful in the House but failed in the Senate. The bill was HR 5045. See HR Rep. No. 1637, 82d Cong. 2d Sess.

which had grown up of allowing one man to be the police officer, the prosecutor, and the judge.

Violation of that requirement led the Court in Wong Yang Sung's Case to issue a writ of habeas corpus to save an alien from deportation where the hearing examiner did not meet the requirements of the Administrative Procedure Act. That was a collateral attack on the administrative proceeding, successfully made even though no objection to the examiner was raised at the hearing.[2]

The objection raised in the present case likewise was not made at the hearing; but it was made before review of the order had been completed. It would seem, therefore, that reversal of this administrative order would follow a fortiori from Wong Yang Sung's Case.

No one knows how the commingling of police, prosecutor and judicial functions in one person may affect a particular decision. In some situations it might make no difference; in others it might subtly corrupt the administrative process. The only important consideration for us is that Congress has condemned the practice; and we as supervisors of the federal system should see to it that the law is enforced, not selectively but in all cases coming before us.

Of course, an agency that flouts the mandate for fair examiners does not lose jurisdiction of the case. Even habeas corpus is no longer restricted to the testing of "jurisdiction" in the historic sense. See Johnson v. Zerbst, 304, US 458, 467, 82 L ed 1461, 1468, 58 S Ct 1019, 146 ALR 357; Bowen v. Johnston, 306 US 19, 24, 83 L ed 455, 459, 59 S Ct 442. But the action of the Commission in the present case created an error that permeates the entire proceeding. It is error that goes to the very vitals of the case. I would therefore set aside

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[2] And the alien in that case, like the respondent here, was represented by counsel in the administrative proceedings.

the order and send the case back for a hearing that meets the statutory standards of fairness. I would make the rule of Wong Yang Sung's Case good for more than the day and the occasion.

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HOTCH v. UNITED STATES
No. 13621

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

March 22, 1954

Before STEPHENS, BONE, and ORR, Circuit Judges.

STEPHENS, Circuit Judge.

Steven V. Hotch was convicted of fishing in violation of a regulation of the Department of the Interior extending the period closed to commercial fishing on the Taku inlet.[1] In an opinion filed September 14, 1953, this court affirmed the conviction, holding that the cited regulation was within the scope of the authority delegated by statute,[2] and that it applied to Hotch. See Hotch v. United States, 9 Cir., 1953, 208 F. 2d 244. Subsequently, Hotch petitioned this court for a rehearing at which time he first raised the argument that the regulation was not effective since it had not been published in the Federal Register. As the petition raised a jurisdictional point, we entertained it and in a supplemental opinion, filed December 2, 1953, reversed the conviction on the ground that the regulation closing the Taku Inlet to commercial fishing from 6:00 P.M. Thursday of each week

[1] Regulatory Announcement 35, Announcement No. 2, announced by the Regional Director of the Fish and Wildlife Service, Juneau, Alaska, under authority delegated to him by the Secretary of the Interior, See Title 48 U.S.C.A. § 221, and Title 50 C.F.R. § 102.3(a).

[2] Title 48 U.S.C.A. § 220 et seq.

was ineffective since it had not been published in the Federal Register.[3] Hotch v. United States, 9 Cir., 1953, 208 F. 2d 249.

The United States now petitions for a rehearing on the ground that publication was not necessary to make the regulation in issue effective against the defendant in this action since (as it is stated in the petition) the defendant had actual notice of the extended closed period.

Section 5(a) of the Federal Register Act, Title 44 U.S.C.A. § 305, requires the publication in the Federal Register of, among other documents,[4] such documents or classes of documents as may be required to be published by Act of Congress.[5] Any such document which is not duly published is invalid.[6] In 1946, Congress enacted the Administrative Procedure Act, 60 Stat. 237, 5 U.S.C.A. § 1001 et seq., in which it described certain classes of documents which it required to be published.

Section 4(a) of the Administrative Procedure Act, Title 5 U.S.C.A. § 1003(a), requires that:

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[3] Title 5 U.S.C.A. §§ 1001(c), 1002(a)(3), and 1003.

[4] The term "document" includes agency rules, by definition. Title 44 U.S.C.A. § 304.

[5] Section 5: "(a) There shall be published in the Federal Register * * * (3) such documents or classes of documents as may be required so to be published by Act of the Congress: * * *" Title 44 U.S.C.A. § 305.

[6] Section 7: "No document required under section 305(a) of this chapter to be published in the Federal Register shall be valid as against any person who has not had actual knowledge thereof until the duplicate originals or certified copies of the document shall have been filed with the Division and a copy made available for public inspection as provided in section 302 of this chapter; and unless otherwise specifically provided by statute, such filing of any document, required or authorized to be published under section 305 of this chapter, shall, except in cases where notice by publication is insufficient in law, be sufficient to give notice of the contents of such documents to any person subject thereto or affected thereby. * * *" Title 44 U.S.C.A. § 307.

> "General notice of proposed rule making shall be published in the Federal Register (unless all persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law) * * *."[7]

And Section 3(a)(3), Title 5 U.S.C.A. § 1002(a)(3) requires that:

> "Every agency[8] shall separately state and currently publish in the Federal Register * * * substantive rules adopted as authorized by law * * *."

We quote from the Report of the House of Representatives Committee on the Judiciary in its statement on the substance of the Administrative Procedure Act:

> "In the 'rule making' (that is, 'legislative') function it [the Administrative Procedure Act] provides that with certain exceptions agencies must publish notice and at least permit interested parties to submit their views in writing for agency consideration *before the issuance of general regulations* (sec. 4) [underscoring ours]." U.S. Code Congressional Service, 79th Congress, Second Session, 1946, p. 1195, at 1205.

The report goes on to state that hearings need not be held on a proposed regulation[9] unless required by statute.

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[7] It will be noted that the only exception from the necessity of publication is where the persons subject to a particular rule are specifically named, and even then only if they are also either personally served or have actual notice. In the instant case, neither the statute fixing closed periods, Title 48 U.S.C.A. § 231, nor the proposed regulations extending the statutory closed period (see Title 50 CFR §§ 119.4 and 102.3a, and Regulatory Announcement 34, Announcement No. 2) names the persons subject thereto. Therefore, the exception clause to the requirement of publication in section 4(a) of the Administrative Procedure Act as to persons with actual notice does not apply.

[8] "'Agency' means each authority * * * of the Government of the United States other than Congress, the courts, or the governments of the possessions, Territories, or the District of Columbia." Title 5 U.S.C.A. § 1001(a).

[9] While the Administrative Procedure Act uses the term "rule", its definition encompasses the term "regulation". See Title 5

But the important disclosure is that publication is a prerequisite to the *issuance* of a regulation.

[1] The Congressional directive in regard to the procedure to be foliowed in the issuance of agency regulations must be strictly complied with, since the issuance of regulations is in effect an exercise of delegated legislative power. In the case before us, neither notice that a regulation extending the closed period on the Taku Inlet was to be issued, nor the proposed regulation itself, was published in the Federal Register. The failure to compiy with either of the referred to provisions of the Administrative Procedure Act means that the procedure laid down by Congress for the implementation of agency rules and regulations has not been met.

Appellee (United States) relies heavily on the language of section 7 of the Federal Register Act, Title 44 U.S.C.A. § 307, to support its contention that *actual notice* is a substitute for the requirement of publication, to-wit:

> "No document required under section 305(a) of this chapter to be published in the Federal Register shall be valid *as against any person who has not had actual knowledge* thereof until the duplicate originals or certified copies of the documents shall have been filed with the Division [10] and a copy made available for public inspection as provided in section 302 of this chapter [section 2 of the Federal Register Act]: * * *." [Underscoring ours]

But section 7 does not imply, as appellee would have it, that the referred to document or rule would be valid without publication as to a person who has actual notice. For section 7 must be read in connection with section 2

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U.S.C.A. § 1001(c) and Report of the House of Representatives Committee on the Judiciary: "* * * general regulations (called 'rules' in the bill) * * *." U. S. Code Congressional Service, 79th Congress, Second Session, 1946, p. 1195 at 1205.

[10] The National Archives Establishment of the Office of the Administrator of General Services. Title 44 U.S.C.A. § 301; § 1 Federal Register Act.

which it modifies. Section 2 sets up a requirement in addition to publication, i.e., it provides that an original and two duplicate originals of a proposed rule must be filed with the Division. And section 7 provides that a proposed rule is not valid, although published, until those duplicate originals have been filed. An exception to the requirement of *filing the duplicate originals* is made in the circumstances where the interested party has had *actual notice*. But no exception is made to the independent requirement of publication, nor can section 7 of the Federal Register Act be inferred to intend such an exception, particularly in view of the reiteration of the requirement of publication found in subsections 4(a) and (c) of the Administrative Procedure Act, which is a later expression by Congress; Title 5 U.S.C.A. § 1003(a) and (c).

[2] While the Administrative Procedure Act and the Federal Register Act are set up in terms of making information available to the public, the Acts are more than mere recording statutes whose function is solely to give constructive notice to persons who do not have actual notice of certain agency rules.[11] The Acts set up the procedure which must be followed in order for agency rulings to be given the force of law. Unless the prescribed procedures are complied with, the agency (or administrative) rule has not been legally issued, and consequently it is ineffective.

The United States, in support of its argument that actual notice obviates the need for publication in the

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[11] "It is an elementary rule in the construction of *recording* laws that notice of an unrecorded instrument is equivalent to the recording of it, with respect to the person having such notice." [Underscoring ours.] 45 Am. Jur. 527. "Constructive notice is the law's substitute for actual notice, * * *. Constructive notice has sometimes been defined by statute as notice imputed to a person not having actual notice, and it has been said that an essential part of the presumption is that the person sought to be charged is in fact ignorant of the facts." 39 Am. Jur. 236.

Federal Register, cites cases in which it has been held that publication gives constructive notice to all interested parties that a rule has been issued.[12] However, the holdings in those cases do not support the conclusion that a required definite procedure in the establishment of a criminal offense is waived by personal notice that the legislative body having jurisdiction to legislate had intended to create the offense.

[3-6] Under our system of law, no act is punishable as a crime unless it is specifically condemned by the common law or by a statutory enactment of the legislature.[13] The Congress has here made it an unlawful offense against the United States to fish in "closed" waters, and has delegated the authority to determine which waters shall be closed to the Secretary of the Interior who, in turn, has subdelegated his authority. Since Congress could delegate its authority, it could also delegate the manner in which that authority is to be exercised. Therefore, the Administrative Procedure Act and the Federal Register Act must be read as a part of every Congressional delegation of authority, unless specifically excepted. Those Acts require publication, irrespective of actual notice, as a prerequisite to the *issuance* of a regulation making certain acts criminal. If notice of a proposed rule is not published in the Federal Register at least thirty days prior to its issuance, or if good cause is not found and published for the immediate issuance of a rule,[14] the rule cannot be legally

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[12] Among the cited cases are: Federal Crop Insurance Corp. v. Merrill, 1947, 332 U.S. 380, 385, 68 S. Ct. 1, 92 L. Ed. 10; Flannagan v. United States, 9 Cir., 1944, 145 F.2d 740; Kempe v. United States, 8 Cir., 1945, 151 F.2d 680; and Borak v. Biddle, 1944, 78 U.S. App. D.C. 374, 141 F.2d 278, 280.

See, also, Willapoint Oysters v. Ewing, 9 Cir., 1949, 174 F. 2d 676; United States v. Morton Salt Co., 1950, 338 U.S. 632, 70 S. Ct. 357, 94 L. Ed. 401.

[13] 22 C.J.S., Criminal Law, § 17.

[14] "The required publication or service of any substantive rule * * * shall be made not less than thirty days prior to the effective

issued; if the rule itself is not published, it follows that it has not been issued; and if a rule has not been issued, it has no force as law.

[7-9] If certain acts have not been made crimes by duly enacted law, the knowledge of their contemplated administrative proscription cannot subject the informed person to criminal prosecution. While ignorance of the law is no defense, it is conversely true that a law which has *not* been duly enacted is not a law, and therefore a person who does not comply with its provisions cannot be guilty of any crime.

[10] We hold that since neither the proposed regulation nor the regulation itself in the instant case were ever published, the regulation is not valid whether or not appellant had actual notice of its contents. Whether or not actual notice might be required in addition to publication in certain circumstances,[15] we do not decide.

It will be noted that on February 15, 1952, just three months prior to the instant extension of the closed period on the Taku Inlet to 6:00 P.M. Thursday, the Department of the Interior had made changes in the closed period on the Taku Inlet through a regulation duly published in the Federal Register. 17 F.R. 1478, 50 C.F.R. 119.5. The instant, further, extension of the closed period on the Taku Inlet should have been accomplished in the same way.

The petition of the United States for rehearing is denied.

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date thereof except as otherwise provided by the agency upon good cause found and published with the rule." Title 5 U.S.C.A. § 1003(c).

[15] As the United States in its brief points out, there are times when the commercial fishing regulations are changed while commercial fishermen are at sea and when it would be unjust to bind them with regulations published in Washington, D. C.

EASTERN AIR LINES, INC.,
*Appellant*

v.

UNION TRUST COMPANY et al.,
*Appellees*

UNITED STATES OF AMERICA,
*Appellant*

v.

UNION TRUST COMPANY et al.,
*Appellees*

Nos. 11991, 11992, 12017, 12018

UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT

Argued June 22, 1954

Decided Feb. 8, 1955

Petition for Rehearing in Banc Denied in all Cases on April 15, 1955

Petition for Rehearing Denied by the Division which Heard the Case in Nos. 11991-2 on May 4, 1955

Petition for Rehearing Denied by the Division which Heard the Cases in Nos. 12017-8 on May 11, 1955

Before EDGERTON, WILBUR K. MILLER and FAHY, Circuit Judges.

WILBUR K. MILLER, Circuit Judge.

On the morning of November 1, 1949, an Eastern Air Lines DC-4 plane was flying from New York to Washington, carrying fifty-one passengers and a crew of four. When it was on final approach for landing on runway 3 at the Washington National Airport and at an altitude

of about 300 feet, the airliner was struck from above and behind by a P-38 military-type aircraft just purchased by the Bolivian Government, which was being tested by a Bolivian military pilot, Eric Bridoux, who was its only occupant. The DC-4 was cut in two. The forward part fell in the Potomac River, the after portion on the Virginia shore. All fifty-five persons aboard were killed. The P-38, badly damaged, of course, plunged into the river but somehow Bridoux escaped from the cockpit. He was rescued and, despite serious injuries, survived.

These suits were brought in the United States District Court for the District of Columbia by the Union Trust Company and Melville W. Stuart as the executors of Ralph F. Miller and Mildred E. Miller, his wife, who were passengers on the DC-4. Eastern Air Lines, Inc., and Eric Bridoux were named as defendants in two of the actions and the United States was the defendant in the other two.[1] Many similar suits filed on behalf of the estates of others who died in the fatal crash are pending under an agreement that the determination of liability in these cases shall govern their disposition.[2]

Although the two captioned cases against Bridoux and Eastern were tried to a jury, and the two against the Government to the court, by agreement of the parties all four actions were tried simultaneously. The jury found Bridoux not "liable," but found against Eastern

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[1] Aubin & Lyons, t/a Universal Marine and Supply Company, were also named as defendants on the theory they owned or had some interest in the P-38. They were dismissed when it appeared that title to the plane had passed to the Bolivian Government.

[2] It was also agreed that the determination of the situs of the accident (whether it occured over the Potomac River, which is in the District of Columbia, or over land in Virginia), made in these cases, shall be binding in all the others. The situs is important because a Virginia statute limits recovery for wrongful death to $15,000. In the District of Columbia there is no statutory limit.

Air Lines in the sum of $50,000 for the estate of Ralph F. Miller and in the sum of $15,000 for the estate of his wife. In the Federal Tort Claims actions against the United States, the trial judge held the Government liable to the estates and fixed the damages at $50,000 and $15,000 respectively. D.C. 113 F.Supp. 80. Eastern Air Lines and the United States appeal.

I

We first summarize the factual background which is essential to an understanding of the reasons for reversal advanced by the appellants. The Washington National is a controlled airport; that is to say, from a glass-enclosed observation platform in a control tower standing above and west of runway 3, employees of the Civil Aeronautics Administration observe arriving and departing planes and direct their movements by radio. An incoming plane may not land and a departing plane may not take off until it receives tower permission to do so.

The Administrator of Civil Aeronautics adopted, and published in the Federal Register October 14, 1949 [14 Fed. Reg. 6247-6250], a regulation for the administration of the Washington National, which is a civilian airport owned by the United States. Section 570.55(c) of the regulation is as follows:

> "(c) Aircraft landing or taking off shall conform to the air traffic pattern as published jointly in the Airman's Guide by the Anacostia Naval Air Station, Bolling Field and the Washington National Airport."

The air traffic pattern referred to is a map of the airport and vicinity, with lines drawn over it intended to show the general flight patterns for taking off from and landing on the various runways. For landing on runway 3, it shows a southward pattern to a point south of Alexandria (the downwind leg), then an east turn until over the Potomac River (the base leg), then northwardly over the river to a point a short distance northeast of Alex-

andria, where it curves to the left over the Potomac Yards, and then a curve to the right in a line for a straight approach to runway 3. The drawing itself was published in the Airman's Guide March 1, 1949, but was not published in the Federal Register until August 7, 1952, long after the accident here involved. The regulation published October 14, 1949, referred to but did not include the traffic pattern.

Over Eastern Air Lines' vehement objection, the trial court admitted the traffic pattern when it was offered in evidence by the appellees, and charged the jury that it was a binding Federal regulation, and that an unauthorized deviation therefrom would be negligence *per se*. Eastern admittedly had knowledge of the pattern.

On the morning of the accident Glenn D. Tigner, one of the seven traffic control operators who were working in the tower, was advised by the Eastern DC-4 at about 11:38 a.m. that it was over Beltsville, Maryland, 15 miles northeast of the airport, and was asking for landing instructions. Tigner authorized it to enter a left traffic pattern for landing on runway 3 and advised the pilot to contact the tower again from a point closer to the airport. Tigner testified that in a second communication, when the Eastern plane was still north of the airport, he cleared it to land on runway 3.[3] He fixed the time of

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[3] The Administrator of Civil Aeronautics was called by the court as a witness on the meaning of the phrase "cleared to land". He testified that when a plane in the traffic pattern of an airport is "cleared to land," the pilot of the plane is thereby authorized to commence his landing approach operation immediately; in other words, when a pilot receives that clearance, wherever he may be in the traffic pattern, there is no plane ahead of him and he may make his turn at his discretion and consistently with the safe management of his plane and may come in and land at once on the runway which has been designated by the tower. That this is the only meaning of the phrase "cleared to land" was the unanimous testimony of all the certified air traffic controllers who testified on the subject. The trial judge instructed the jury as a matter of law that such was the meaning of the phrase "cleared to land."

the clearance as approximately 11:44 a.m. The DC-4 continued its flight and entered the traffic pattern as it had been directed to do. It had circled from the pattern and was on final approach for runway 3 when it was struck by the Bolivian plane.

The Bolivian P-38 had taken off from runway 3 at 11:37 a.m. and therefore had been in the air only between nine and ten minutes when the collision occurred. Shortly after he had cleared the DC-4 to land, Tigner observed the P-38 at a high altitude, circling Alexandria about seven miles south of the airport, heading toward the east and starting a turn to its left. Tigner was then talking to another plane. He was informed by a tower colleague the P-38 was requesting landing instructions. He saw it continuing its left turn and said by radio, "Bolivian 927, did you request landing instructions?" Bridoux replied he had done so, whereupon Tigner told him he was cleared to enter the left traffic pattern for runway 3 and asked him to report on his downwind leg west of the airport.

Tigner said when he next saw the P-38 it was about five miles southwest of the airport at about 4,000 feet heading northeastwardly with its gear down and in a steep and rapid descent. At 11:45 a.m. he warned the DC-4 that the P-38 was in traffic. He said to the P-38, "Bolivian 927, make a 360 to your left. You are No. 2 to land. Traffic is an Eastern DC-4, turning final ahead and below you." Bridoux did not acknowledge the message and did not turn as directed. Tigner then called, "Bolivian 927, turn left, turn left. You are No. 2 to land, following an Eastern DC-4 turning final ahead and below you." Bridoux did not acknowledge or comply.

During these transmissions the DC-4 was on its base leg turning into final approach. When Tigner saw the P-38 was not complying with his instructions, he called the DC-4 and said, "Eastern 537, make an immediate

left turn. Traffic is P-38 above and behind you." The DC-4, which had gone only about a quarter of a mile on final approach, responded with a surge of power into a left turn. As it did so, the Bolivian plane struck it.

Bridoux testified that a minute after his take-off he began to have engine trouble. He reported that fact to the tower and requested landing instructions. Receiving no answer, he repeated his request and the tower said, "Land 2 on Runway 3," which he understood to mean there was another plane ahead of him behind which he was to land. He testified he also understood this message to constitute a clearance to land rather than merely clearance to enter the traffic pattern.

When he was about two miles west of the airport descending at a rate of 500 to 600 feet a minute, Bridoux said he saw a plane making a final approach for a landing either on runway 36 or 3, which was either a Beechcraft C-45 or a Lockheed C-60. He said, "* * * I realized that that was the reason I was No. 2 to land." He continued flying south until he was about five or six miles south of the field and then made a 90-degree left turn. As he did so, he observed the Lockheed or Beechcraft on the ground taxiing toward the buildings. He had not seen it actually land.

Having been told by the tower he was No. 2 to land on runway 3 and having seen, as he thought, that the plane which was No. 1 to land on that runway had already done so and had taxied away, Bridoux concluded it was unnecessary for him to check with the tower to learn whether the plane ahead of him had landed. We reproduce in the margin [4] his testimony that he regarded

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[4] "Q. As a matter of fact, at that point you not only accepted that clearance which you told us was given, but you made another complete 360-degree turn around the airport; and then after you

(Con't. on following page)

the tower's statement, "You are No. 2 to land on runway 3," as absolute clearance to land after he had decided for himself, without further communication with or from the tower, that the No. 1 plane was out of the way.

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[4] (Con'd.):

had done that, you started downwind leg five or six miles. A. Because I was No. 2 to land, sir.

"Q. You at no time, Captain, asked the identity of the plane that was ahead of you, did you, Captain? A. No, sir.

"Q. And you had no way of knowing, based upon information from the tower, that that plane was ahead of you, did you, Captain? A. Unless I see.

"Q. And you didn't see it. A. I saw it on final approach, the C-45 or C-60.

"Q. What you are telling us is after getting that clearance, you assumed the plane you saw was the one they meant was ahead of you? A. Yes, sir.

"Q. But you didn't check with the tower to see if that was the plane? A. Why have I got to check, if I am seeing?

"Q. I am not asking you why. I am simply asking you if it isn't a fact that that you didn't check back with the tower to see if that plane you saw was the one ahead of you. A. It isn't necessary, because I was seeing the airplane.

"Q. Would you please answer yes or no to my question? You didn't check back with the tower to see if that plane you told us you noticed on final approach was the one ahead of you, did you? A. When I was on final approach, I called the tower.

"Q. Captain, I am asking you, sir, if after you saw that plane, which you said seemed to be lined up for landing, which seemed to be on approach for landing, on runway 3, did you at any time thereafter ask the tower if that was the plane that had been ahead of you? A. No, I didn't ask. It wasn't necessary to.

"Q. You did not ask the tower— A. Because it wasn't necessary. I was seeing the airplane. I was watching it.

"Q. What you mean is you saw a plane. A. Yes, sir.

"Q. You have no way of knowing whether that one was the one the tower was referring to, or some other plane, have you, Captain? A. There was a way because he was on final approach. If he didn't land yet, I understand he is No. 1.

"Q. Isn't it a fact that from that point on there was a lapse of four or five minutes before you came in, on your own final approach? A. More or less.

"Q. And you never contacted the tower to find out where the plane that was No. 1 was, did you? A. I called on final ap-

(Con't. on following page)

After seeing the Lockheed or Beecheraft taxiing from runway 3, Bridoux flew on for about one and one-quarter miles and made another 90-degree left turn to proceed on final approach, after which he headed north flying at

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[4] (Con'd.):

proach, advising them I was on final, and they could tell me anything at that time, in order to realize that.

"Q. That was after you had lined up for runway 3, wasn't it? A. No, sir.

"Q. You said you were on final approach. A. On final; but the final is not just the straight line. The final is after the turn from base leg.

"Q. Did you ask the tower for any permission before you lined up for final approach? A. No.

"Mr. Bress: He hadn't said he lined up for final approach.

"The Witness: I called to the tower, after the turn from base and I began the final approach.

"By Mr. Galiher:

"Q. And you didn't ask the tower for permission before you began the final approach, did you? A. I didn't have to ask the tower for permission, after I had been cleared for landing, sir.

"Q. You hadn't been cleared to land at that point, had you, Captain? A. I had been cleared for landing, and the first call from the tower cleared me for landing.

"Q. You mean when you were told you were No. 2 to land on runway 3? A. Yes.

"Q. And that is the only clearance you have had up to this point? A. I know I was the second.

"Q. And that was issued upon the final approach? A. No; it was before the final approach.

"Q. Whether it was after or before you had begun the final approach, you had begun the final approach before you got any landing clearance from the tower. A. No, sir. The first call from the tower was when I was cleared for landing.

"Q. For what? A. They cleared me for landing.

"Q. For landing No. 2? A. Yes, sir.

"Q. Did you tell us that being cleared for landing No. 2 is a landing clearance, a final landing clearance? A. If they mention that word, it is.

"Q. You say it was a final landing clearance, the clearance that told you you were cleared to land on runway 3, behind another plane, or No. 2, as I think you used it? A. No. 2. That was all.

"Q. No. 2. You have no way of knowing whether that plane you told us you saw when you were on downwind leg was the

(Con't. on following page)

150 m.p.h. and at an altitude of about 1,200 feet. He said he then called the tower, advising he was on final approach and that the tower responded, saying, "Bolivian P-38, prepare to land on runway 3," and gave him the wind direction; and that he acknowledged the instruction. He then put his flaps down, reduced his speed to about 130 m.p.h., and began an S turn to line up with runway 3. As he did so, he heard over the radio, "Clear to the left, clear to the left," but thought the instruction was for somebody on the ground. He did not turn to the left or take any other action, but continued on his course and the collision occurred two or three seconds later.

The visibility from the P-38 was structurally limited so that Bridoux could not see ahead of him except at a

---

* (Con'd.):

plane you later saw on the landing strip or not, do you? A. I saw the craft, and I assumed it was the No. 1, sir.

"Q. That plane you told us you saw as you were on downwind leg, west of the tower— A. Before.

"Q. Then you told us when you got down south, when you were turning on base leg, you noticed a plane that was landing or had landed—I think you used the expression— A. Yes.

"Q. —on the landing strip. A. Yes.

"Q. It was actually on the ground? A. Yes, sir.

"Q. You had no way of knowing from that distance of five or six miles away, did you, whether that was the same plane you had previously seen, or some other plane, did you? A. I don't know exactly. But I saw more or less the same airplane.

"Q. And you never tried to contact the tower to inquire whether or not the plane you had seen on final approach, as you call it, when you were on downwind leg, was the plane that was No. 1, did you? A. But how am I going to ask the tower that? Am I going to say 'Is the plane I am seeing No. 1? How is the tower going to know what plane I am seeing? There was no reason of calling back to the tower.

"Q. It would have prevented this accident, wouldn't it, if you had called the tower and inquired as to the identity of the plane ahead of you? A. Except that I happened to observe this plane on final approach, not any other plane. Therefore I assumed this was the No. 1. This was the only one on final approach.

"Q. And that is where the trouble came in, because you assumed that was the plane that was ahead of you, isn't it, Captain? A. Probably, sir."

considerable distance. He was flying entirely by time, computing the distance covered by multiplying his speed per minute by the number of minutes traveled. He said that at an altitude of 1,200 feet and four and a half miles from the airport he could see nothing ahead and below for a distance of two and one-half miles. It is also observed that Bridoux said that as he descended the nose of his plane was not more than ten degrees under horizontal, and that he was accomplishing the descent by reducing his speed. Thus there was not enough nose declination to increase appreciably the extent of visibility immediately in front of and below the F-28. Bridoux did not see the Eastern DC-4 at any time.

## II

[1, 2] With the foregoing background, we turn to Eastern's contention that the court erred in admitting as evidence the approach and landing pattern offered as an exhibit by the appellees; and in instructing the jury it was a binding Federal regulation, a breach of which would constitute negligence *per se*.

With respect to the traffic pattern, the court charged the jury as follows:

> "* * * [T]his pattern in a general sense provided that an aircraft arriving from the north and desiring to land at the Washington National Airport on Runway 3 would proceed from north to west, in the general vicinity of the Pentagon, and then proceed from that direction south, on * * * its downwind leg, and continue in the southerly direction south in the direction of the George Washington Memorial Temple and south of the city of Alexandria; then turning due east on what is called the base leg, and ultimately what is called the final approach, a north or northeast heading.
>
> "* * * This is the prescribed pattern. But you are instructed as a matter of law that there is nothing rigid about it. It must be conformed to in a

general way. In other words, the pattern is not a line drawn over the ground which must be followed by the airplane in question. It is just exactly as the word itself indicates, a pattern which must be followed, but not with the rigidity and the inflexibility of a line from one point to another. Indeed, the very purpose of flight traffic patterns is to control traffic, and at an uncontrolled airport it must be followed; but at a controlled airport, such as Washington, the controller has the final say; and you are so instructed.

"However, the unauthorized stepping out of the pattern, leaving the pattern, departing from it—and note my language—the unauthorized stepping out of the pattern, leaving the pattern, departing from it, would be a violation of law, because the pattern is prescribed by rule which has the force and effect of law. And so, therefore, unauthorized action of the character I have just referred to would be negligence, as I have defined that term to you, and would be, as we lawyers say, negligence *per se*, in other words, would be negligence as a result of the very act itself and no further proof would be necessary. This is the negligence, in this aspect of the case, which the plaintiff alleges against Eastern. * * *"

In insisting the court erred in admitting the traffic pattern as an exhibit and in instructing the jury that it was a binding regulation and that an unauthorized deviation from the pattern would be negligence *per se*, Eastern relied on the fact that the traffic pattern had not been published in the Federal Register and cited Hotch v. United States, 9 Cir., 1953, 208 F. 2d 244, 250, as authority that it was therefore not a binding regulation. The pattern had been officially prescribed, however, and Eastern had actual knowledge of it. In those circumstances we think the pilots of the DC-4 were required to follow the pattern and, since it is obviously a safety measure to some extent, the court correctly charged the jury that an unauthorized departure from it was negligence *per se*.

* * * * * * * *

AMERADA PETROLEUM CORPORATION,
*Petitioner*

v.

FEDERAL POWER COMMISSION,
*Respondent*

MIDSTATES OIL CORPORATION,
*Petitioner*

v.

FEDERAL POWER COMMISSION,
*Respondent*

CITIES SERVICE OIL COMPANY,
*Petitioner*

v.

FEDERAL POWER COMMISSION,
*Respondent*

SKELLY OIL COMPANY,
*Petitioner*

v.

FEDERAL POWER COMMISSION,
*Respondent*

Nos. 5044, 5046, 5099, 5103

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

March 17, 1956

Rehearing Denied April 25, 1956

Before HUXMAN, MURRAH and PICKETT, Circuit Judges.

HUXMAN, Circuit Judge.

On June 7, 1954, the Supreme Court rendered its decision in Phillips Petroleum Co. v. State of Wisconsin,

347 U.S. 672, 74 S. Ct. 794, 796, 98 L. Ed. 1035, holding that the Federal Power Commission had jurisdiction over independent producers which engage in "the sale in interstate commerce of natural gas for resale", and that such a company is a natural gas company as defined in the Natural Gas Act, 15 U.S.C.A. §§ 717-717w. This decision was contrary to the Federal Power Commission's prior interpretation of its own jurisdiction over such activities. Shortly after the Phillips decision, on July 16, 1954, the Federal Power Commission issued its order 174.[1] Order 174-A was directed to all "independen producers" as defined and covered by the Natural Gas Act. Among other things it required all independent producers who on or since June 7, 1954, had engaged in the interstate transportation and sale of natural gas subject to the Act to (1) file their contracts in force on June 7, 1954, which in effect became their rate schedules; (2) make no changes in the June 7, 1954, rates except after notice to the Federal Power Commission and subject to its right to suspend such changes; (3) apply to the Commission for certificates of public convenience and necessity covering gas sales made by them; and (4) continue any sales or services rendered until termination was given the express approval of the Federal Power Commission. One commissioner dissented from this order, raising many of the substantive questions asserted by petitioners in this court.

No advance notice was given or hearing held prior to the formulation of orders 174 and 174-A. Petitioners (Amerada Petroleum Corporation, Midstates Oil Corporation, Cities Service Oil Company and Skelly Oil Company) along with more than one hundred other persons and corporations sought by petition for a "rehearing" to have the Commission set aside the order or

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[1] Thereafter the order was changed in minor respects and was superseded by Orders 174-A and 174-B.

change its provisions. The Commission allowed briefs and oral argument in a hearing like that contemplated in Section 4 of the Administrative Procedure Act [2] to be held before the promulgation of general substantive rules and regulations. After that hearing the order was reissued with minor changes, immaterial here, as 174-B. It is from that order petitioners bring the appeals consolidated herein. They assert that the order is appealable, that as independent producers within the definition of the order they have standing to prosecute an appeal; and as grounds for overruling the order they say its formulation violates in several respects the Natural Gas Act, the Administrative Procedure Act, and their rights under the United States Constitution.

[1] Petitioners make a preliminary contention that considered or even as procedural rules and regulations the regulations in question are void because petitioners were not accorded the hearing to which they were entitled under the Administrative Procedure Act before the rules were adopted. Section 4 of the Administrative Procedure Act requires notice of proposed rule making and that an opportunity to participate in the rule making be afforded interested persons unless the agency involved expressly finds that such procedures are impractical, unnecessary or contrary to the public interest. No notice or opportunity to be heard was given with respect to Order 174 or Order 174-A, which was a modification of the original order. Numerous producers including appellants filed application for a rehearing of Order 174-A. The Commission acted upon these applications and granted oral arguments before the full Commission. In granting oral arguments the Commission called for suggestions and comments as to the revision or modification of Order 174-A. Following the submission of briefs and oral arguments, the Commission issued Order 174-B, the order involved in this controversy. Assuming without

[2] 5 U.S.C.A. § 1005.

deciding that under the facts of this case petitioners were entitled to notice and hearing, they have no cause for complaint. They were heard, granted an opportunity to file briefs and present oral arguments. It was only thereafter that Order 174-B, the order under attack here, was formulated. It must, therefore, be said that the order under consideration was adopted only after a full hearing was accorded petitioners.

[2] Petitioners assert that the order violates their substantive rights in a number of respects. We need not pass upon these contentions because in our view the order is not reviewable. Section 19(b) of the Natural Gas Act provides that "Any party to a proceeding * * * aggrieved by an order issued by the Commission * * * may obtain a review of such order in the circuit court of appeals of the United States * * *." The order challenged here was not issued in an adversary proceeding to determine violations of the Natural Gas Act or a Commission ruling thereunder; it purports to be issued under the general rule making power of the Federal Power Commission. It is of general applicability, addressed to all independent producers subject to the Natural Gas Act as defined.

There is no holding or determination by the Commission that the order is applicable to any of the petitioners. Petitioners herein do not admit that they are subject to the Natural Gas Act. They state only that they come within the definition of an independent producer as contained in the order or that they cannot ascertain whether they are within the definition of the order. The only particularly directed order is one against Skelly to show cause why it should not be determined a natural gas company within the Act and why it should not be directed to continue a particular sale and delivery of gas. But that portion of the order is still undisposed of before the Commission. In Canadian River Gas Co. v.

Federal Power Commission, 10 Cir., 110 F.2d 350, it was held that an order directing a particular company to be investigated to determine whether it was a natural gas company within the Act was a preliminary finding and was not appealable. Therefore, jurisdiction to consider the appeal cannot be predicated on the Skelly show cause order.

Without even admitting that the Commission has jurisdiction over them and without a finding by the Commission that it has jurisdiction over any of petitioners, petitioners content that the order violates their substantive rights in several important respects and, therefore, constitutes a final appealable order. They allege that they own and operate gas wells and sell gas under a number of contracts. The opinion is expressed by them that the order may force submission to the jurisdiction of the Federal Power Commission. This position is predicated upon the definition of an independent producer in the order as follows: "An 'independent producer' as that term is defined in §§ 154.91 to 154.202 means any person as defined in the Natural Gas Act who is engaged in the production or gathering of natural gas and who transports natural gas in interstate commerce or sells natural gas in interstate commerce for resale, but who is not primarily engaged in the operation of an interstate pipeline." Those are almost the exact words of the Supreme Court in defining an independent producer.[3] Without a determination by the Commission whether any of them fall within this definition, and without the aid of a particular application of the definition by the FPC to any given set of facts, we are asked to examine and define the exact extent of the production and gathering exemption in the Natural Gas Act as it applied to these petitioners and are in fact asked to determine that they are not subject to the jurisdiction of the Commission.

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[3] See Phillips Petroleum Co. v. State of Wisconsin, 347 U.S. 672, 74 S. Ct. 794, 98 L. Ed. 1035.

The case most analogous to the one before us is United Gas Pipeline Co. v. Federal Power Comm., 86 U.S.App. D.C. 314, 181 F. 2d 796. That case also arose under the Natural Gas Act. It likewise involved a general order. The order was directed to the United Gas Pipeline Company and all other companies similarly situated, requiring them to file rates on a designated basis. The Gas Companies there, as here, contended that the provisions of the order requiring them to file rate schedules worked a retroactive change in rates and was, therefore, reviewable on appeal. The court in a well considered opinion held that the order was general; that it was prospective in nature and of general applicability and not subject to review. That court also considered and distinguished Columbia Broadcasting System, Inc., v. United States, 316 U.S. 407, 62 S. Ct. 1194, 86 L. Ed. 1563, upon which petitioners there, as here, placed strong reliance. We agree with the analysis of the court of the Columbia Broadcasting System case distinguishing it upon facts, and it is our conclusion that the facts in this case likewise distinguish it from that case.

As pointed out, the challenged order is directed to no one. It requires only that all gas companies falling within the definition as laid down make application for a certificate of convenience and file their rate schedules as of June 7. It leaves to each company in the first instance a determination of whether it is under the Act. If petitioners are right in their contention that their activities do not bring them within the Commission's jurisdiction they need do nothing. The difficulty is that if it is ultimately determined that they are under the jurisdiction of the Commission then their failure to comply with the general order subjects them to severe penalties. But that is a difficulty inherent in the way in which the need for the exercise of the Commission's authority arose. It was necessary for the Commission to make a beginning. For this purpose it promulgated general rules

and regulations applying to all subject to the Act. It first defined companies subject to its jurisdiction and required only that such companies file schedules of rates and make applications for certificates of convenience. This is the only practical way the Commission could have made a beginning. The only alternative would have been to hold individual hearings with respect to each of innumerable companies to determine upon the adduced facts whether they were under its jurisdiction. The impracticability of such a method is obvious.

Neither do we think that the assertion that by the application for a certificate of convenience the applicant submits itself to the jurisdiction of th court is well taken. Such application, of course, can be a qualified one and made so as to reserve to the applicant the right to challenge the jurisdiction of the Commission.

Nor do we think the contention that by fixing the schedule rates as of June 7 as the effective rate constitutes a retroactive fixing of rates or makes a general order substantive in that respect and, therefore, subject to appeal. Again the Commission was faced with the necessity of a beginning rate. It might well have fixed the rate as of a different time as the beginning rate, and it may even be conceded that the rate as of June 7 might work hardship in a particular case. But that does not make the regulation requiring the filing of such a rate definitive in character, subject to review on appeal. The door is left wide open for a proceeding before the Commission to correct such rate if it is inequitable or unjust. The fact remains that this case comes to us without a record, without a single established fact or finding, and without evidence, and in that posture we as an appellate court are asked to exercise our appellate powers of review. In fact, we are asked to determine that petitioners are not subject to the jurisdiction of the Commission without a single fact upon which to base such

determination and in the absence of any findings of fact by the Commission.

[3] Section 10 of the Administrative Procedure Act is pleaded to support our jurisdiction to review the merits of petitioners' claims. It is our view that that Section adds nothing to our authority. It provides for a right of review in a proper court of final agency action where other statutory authority is absent or inadequate, but here Section 19(b) of the Gas Act provides for a review and we think it is entirely adequate and, therefore, makes inapplicable Section 10 of the Administrative Procedure Act.

It is our conclusion that the petitions for review are premature and are, therefore, dismissed.

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# In the Supreme Court of the United States

OCTOBER TERM, 1961

ELOF HANSSON, INC., PETITIONER

*v.*

UNITED STATES

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

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*Solicitor General,*
WILLIAM H. ORRICK, JR.,
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# In the Supreme Court of the United States

OCTOBER TERM, 1961

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No. 380

ELOF HANSSON, INC., PETITIONER

*v.*

UNITED STATES

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS*

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## BRIEF FOR THE UNITED STATES IN OPPOSITION

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### OPINIONS BELOW

The opinion of the single judge of the United States Customs Court (Tr. 76-94) [1] is reported at 41 Cust. Ct. 519. The opinion of the Third Division of the Customs Court (Tr. 98-112) is reported at 178 F. Supp. 922. The opinion of the United States Court of Customs and Patent Appeals (Pet. App. B, 3-8) is reported at 96 Treasury Decisions (No. 24, June 15, 1961) 71.

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[1] "Tr." refers to the Transcript of the Record before the Court of Customs and Patent Appeals. "R" refers to the Record before this Court.

## JURISDICTION

The judgment of the Court of Customs and Patent Appeals was entered on December 22, 1960 (R. 3). A timely petition for rehearing was denied on June 5, 1961 (R. 14). The petition for a writ of certiorari was filed on September 1, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1256.[2]

## QUESTIONS PRESENTED

1. Whether, petitioner, in the circumstances of the case, may challenge an administrative determination under the Antidumping Act on a ground which petitioner did not raise in the proceedings culminating in that determination.

2. Whether notice of an investigation conducted by the Secretary of the Treasury under the Antidumping Act must be published in the Federal Register.

## STATUTES INVOLVED

The relevant provisions of the Antidumping Act of 1921, 42 Stat. 11, 19 U.S.C. 160, *et seq.* (1952 ed.) and of the Administrative Procedure Act are set forth in the Appendix, *infra,* pp. 13-18.

## STATEMENT

In March 1953, pursuant to a complaint by the American Hardboard Association (Tr. 51), the Secretary of the Treasury began an investigation under Section 201 (a) of the Antidumping Act of 1921 (App., *infra,* p. 17) to determine whether importations of Swedish hardboard were being, or were likely to be, sold in the United States at less than fair value, to

[2] The petition inadvertently refers to 28 U.S.C. 1254(1).

the injury of the American hardboard industry. Petitioner, an importer of Swedish hardboard, was apprised of this investigation in a discussion with an Examiner of Merchandise in the office of the United States Appraiser of Merchandise at New York City prior to May 5, 1953 (Tr. 12). At that time petitioner was requested to furnish certain data from its Swedish suppliers, and under a covering letter dated May 5, 1953, petitioner submitted this data (Tr. 12).

As the investigation progressed, the Treasury amassed a voluminous file consisting of information supplied by importers, the domestic industry, and Swedish manufacturers (Tr. 27-28, 56-57, 12). Conferences were held with representatives of importers, the domestic industry, and the Swedish Embassy (Tr. 27, 50). Counsel for petitioner, in particular, conferred several times with Treasury officials and supplied information (Tr. 44, 50, 99, 111). Petitioner was kept advised of the investigation and was told that Treasury "would welcome any information pertinent to the investigation" (Tr. 44, 52). Accordingly, on August 10, 1953, counsel for petitioner submitted a four page letter, with thirteen pages of attachments, in support of its contention that sales at less than fair value were not taking place (*i.e.*, that there was no dumping of Swedish hardboard) (Deft's. Ex. B-6). Four more letters containing relevant data were so submitted (Deft's Exs. B-7, B-8, B-9, B11).

In October 1953, pending completion of the investigation, the Acting Commissioner of Customs directed appraisement to be withheld on all unappraised Swedish hardboard (Tr. 11-12, 111). From that date for-

ward, in accordance with standard Treasury Department procedure, every importer of Swedish hardboard was mailed customs Form No. 6459, "Notice of Withheld Appraisement," advising that an investigation of dumping was in progress (Tr. 12, 45-48, 79, 111). No less than 106 such notices were sent to petitioner (Deft's. Ex. D-1, D-2).

Petitioner continued to supply information in support of the importers' position. On October 28, 1953, it responded to questions of the Appraiser in Philadelphia (Deft's. Ex. B-10). In December 1953, and March, May, and June 1954, petitioner supplied information and submitted arguments on the issue of injury to the domestic industry (Deft's. Exs. B-12, B-13, B-14, B-15).

The importation here involved was entered at the port of New York in December 1953 (Tr. 11). Notice of Withheld Appraisement was sent to petitioner in February 1954. On August 26, 1954, the Acting Secretary of the Treasury made a finding of dumping, which was published in the Federal Register (Tr. 10-11). Subsequently, the Appraiser at the port of New York appraised the merchandise in question and correctly determined its purchase price to be less than its foreign market value within the meaning of Section 202(a) (Tr. 11). Accordingly, he assessed the special dumping duty prescribed by Section 202(a), 19 U.S.C. 161(a). Notice of appraisement was thereupon mailed to petitioner (Tr. 12).

Petitioner then brought this appeal for reappraisement in the Customs Court (Tr. 6). There, for the first time, it raised the question of whether the notice

of the investigation of dumping was sufficient, arguing that the failure to publish notice of the investigation in the Federal Register invalidated the Secretary's finding of dumping. A single judge of the court rejected this contention, holding that such publication was not required since the Administrative Procedure Act, which provides for such notice, did not apply to investigations under Section 201(a) of the Antidumping Act (Tr. 76-93). The Appellate Term of the Third Division of the Customs Court reversed. It held that the Administrative Procedure Act was applicable to dumping investigations and that the failure to publish notice as required by Section 4 of that Act rendered the finding of dumping invalid (Tr. 98-113).

The Appellate Term judgment was, in turn, reversed by the Court of Customs and Patent Appeals (Tr. 1). That court held, without deciding the applicability of the Administrative Procedure Act, that petitioner had waived the alleged irregularity by failing to raise it during the administrative proceedings.

## ARGUMENT

In this action, petitioner endeavors to invalidate the dumping finding of the Secretary of the Treasury on the sole ground that notice of the investigation culminating in that finding was not published in the Federal Register. The record shows, however, that petitioner not only had actual notice of the investigation, but also—along with other importers of Swedish hardboard—participated fully. Moreover, at no time during the administrative proceedings did petitioner raise the purported procedural irregularity.

Rather, it waited until the investigation had been completed and then raised the point for the first time on its challenge in the Customs Court to the imposition of the special dumping duty.

In these circumstances, the Court of Customs and Patent Appeals was clearly correct in its conclusion that, under the established principles confirmed by this Court in *United States* v. *Tucker Truck Lines*, 344 U.S. 33, petitioner's assertion regarding Federal Register notice came too late. Additionally, although the court below did not reach the question, there is no necessity to give such notice of investigation under the Antidumping Act. Further review by this Court is, therefore, not warranted.

1. In *United States* v. *Tucker Truck Lines, supra*, a motor carrier applied to the Interstate Commerce Commission for a certificate of convenience and necessity. Tucker intervened in the Commission proceedings to oppose the application. The Commission granted the certificate, whereupon Tucker sought judicial review. In the district court, Tucker contended for the first time that the Commission examiner who conducted the hearing on the application had not been appointed in accordance with Section 11 of the Administrative Procedure Act. The three judge district court accepted this contention and invalidated the certification. 100 F. Supp. 432.

This Court reversed. It agreed that there was a "defect in the examiner's appointment * * * which would invalidate a resulting order if the Commission had overruled an appropriate objection made during the hearings" 344 U.S. at 38. Since, however, an ob-

jection had not been made at that time, Tucker was precluded from challenging the certification on that ground in the district court. As the Court pointed out (344 U.S. at 36-37):

> We have recognized in more than a few decisions, and Congress has recognized in more than a few statutes, that orderly procedure and good administration require that objections to the proceedings of an administrative agency be made while it has opportunity for correction in order to raise issues reviewable by the courts. It is urged in this case that the Commission had a predetermined policy on this subject which would have required it to overrule the objection if made. While this may well be true, the Commission is obliged to deal with a large number of like cases. Repetition of the objection in them might lead to a change of policy, or, if it did not, the Commission would at least be put on notice of the accumulating risk of wholesale reversals being incurred by its persistence. Simple fairness to those who are engaged in the tasks of administration, and to litigants, requires as a general rule that courts should not topple over administrative decisions unless the administrative body not only has erred but has erred against objection made at the time appropriate under its practice.

This rationale plainly applies to the present case. Here, as in *Tucker*, the issue sought to be raised initially on judicial review "is clearly an afterthought, brought forward at the last possible moment to undo the ad-

ministrative proceedings without consideration of the merits and can prevail only from technical compulsion irrespective of considerations of practical justice." 344 U.S. at 36. "Orderly procedure and good administration" as well as "simple fairness" to the Secretary and to the interested parties required petitioner to object to the lack of Federal Register notice during the course of administrative proceedings in which it fully participated. Obviously petitioner had ample notice. The only possible injury to petitioner, therefore, lies in the chance that some other person would have responded and introduced evidence or argument not presented by petitioner. The chance seems theoretical at best, but petitioner could have secured it by timely objection to the lack of publication in the Federal Register. Had it done so, the Secretary would have had an "opportunity for correction". By not doing so, petitioner waived the objection.[3]

Petitioner's reliance (Pet. 5) upon *Hotch* v. *United States*, 212 F. 2d 280 (C.A. 9), is misplaced. Apart from the fact that a criminal sanction was there involved, the agency rule under attack had been issued without any hearing being afforded interested parties. Thus, unlike the situation in *Tucker* and this case, the objection could not have been raised on the administrative level.[4]

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[3] See, also, *e.g.*, *Federal Power Commission* v. *Colorado Interstate Gas Co.*, 348 U.S. 492; *Moog Industries Inc.* v. *Federal Trade Commission*, 355 U.S. 411, 414.

[4] In the event that certiorari is granted, the government may also urge that petitioner's assertion is precluded by Section 10(e) of the Administrative Procedure Act since the failure to provide Federal Register notice was not shown to be prejudicial.

2. In any event, in 1953 there was no requirement of Federal Register notice of the commencement of an investigation under the Antidumping Act. At that time the Act concededly contained no provision for such notice and the notice provisions of the Administrative Procedure Act do not apply to dumping investigations.

a. Under the Administrative Procedure Act, all agency action is classifiable either as "rules" or "orders". Section 2(c), 2(d), App., *infra*, p. 13. The Act does not apply to the agency process for the formulation of orders unless some statute requires determination on the record after opportunity for an agency hearing. Section 5, App., *infra*, p. 16. No statute requires a finding of dumping to be made in this manner.

As Professor Davis has pointed out, rule making resembles the enactment of a statute. 1 Davis; *Administrative Law Treatise* 287-288 (1958 ed.). In 1953 the Secretary's function under Section 201(a)[5] was to determine whether American industry was being injured by dumping. A determination of dumping requires findings of "purchase price" and "foreign market value" as defined in Sections 203 and 205 of the Antidumping Act, 19 U.S.C. 162, 164. Therefore, there is absent the policy-making function which the legislative process comprehends. "[T]he powers granted by section 201(a) * * * are ministerial only, call for the exercise of no discretion except in methods, and are fact finding only." *United States* v. *Central Vermont*

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[5] In 1954 the Antidumping Act was amended to provide that the determination of injury to domestic industry would be made by the Tariff Commission after the Secretary found dumping. Act of September 1, 1954, c. 1213, Title III, Section 301, 68 Stat. 1138

*Ry. Co.*, 17 CCPA (Customs) 166, 172, 173; *Kleberg & Co.* v. *United States*, 71 F. 2d 332, 335.

Further, to the extent that the Antidumping Act provides that the Secretary shall make a finding of dumping "after such investigation as he deems necessary", the manner of proceeding under Section 201(a) is left to agency discretion and as such is beyond the reach of the Administrative Procedure Act. See Section 10 of that Act; 4 Davis, *Administrative Law Treatise* 33, 80 (1958 ed.). Cf. *United States* v. *Central Vermont Ry. Co.*, *supra*, at 172, 173, 174; *Kleberg & Co.* v. *United States*, 21 CCPA (Customs) 110, 115, 71 F. 2d 332, 334.

b. The conclusion that the Administrative Procedure Act does not apply to dumping investigations is buttressed by common understanding. In 1958 the Antidumping Act was amended to provide specifically for publication of notice of a dumping investigation. Act of August 14, 1958, 72 Stat. 583. The House Committee on Ways and Means added this provision after an Assistant Secretary of the Treasury, the American Bar Association, and the spokesman for the Association of the Customs Bar all categorically asserted in hearings before the committee that existing law failed to require such notice. Hearings, Amendments to the Antidumping Act of 1921, House Ways and Means Committee, 85th Cong., 1st Sess. 77, 100, 101, 223, 224. Numerous other witnesses and organizations urged upon the Committee the need for this procedural reform without hint of a suggestion that the Administrative Procedure Act might already be applicable. *Id.* at 123, 131, 132, 199, 200, 210, 218, 220, 370-71, 374.

378, 398, 400, 402, 403, 405, 421, 425.[6] The entire context of this legislation points to the conclusion that the Congress, the Treasury Department, the Bar, the commentators and interested importers were of the view that the Procedure Act was inapplicable to this type of investigation. For it is most unlikely that that Act could have been overlooked as the controlling law.

3. Finally, the enactment of the 1958 Amendment to the Antidumping Act of 1921 makes review of the decision below inappropriate for two additional reasons. First, the underlying legal question giving rise to the present case has been resolved by the statutory requirement that notice of dumping investigations be filed in the Federal Register. Second, there is no reason for the Court to undertake at this time a premature and wholly abstract consideration of the circumstances in which a party may be precluded from challenging an agency decision on grounds of violation of the Administrative Procedure Act; for the specific issue of the right to reversal of an administrative finding of

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[6] "A further well-publicized flaw in this portion of the act is its lack of provision for public notice that a dumping investigation has been authorized or that one has been concluded. The Antidumping Act amendments passed by the House in 1957 (H.R. 6006) would remedy this situation by requiring announcement in the Federal Register both that an investigation is contemplated and that a decision has been reached, including the reasons therefor. This should go a long way toward correcting a much criticized omission. [I]nterested parties, now [are] to be officially notified of the pendency of an investigation * * *" Hearings on Antidumping, Senate Committee on Finance, 85th Cong., 2d Sess., 269, 287, quoting from Ehrenhaft, "Protection Against International Price Discrimination": Note, *United States Countervailing and Antidumping Duties*, 58 Col. L. Rev. 44, 61 (1958).

dumping for failure of published notice will henceforth be controlled by the 1958 Amendment to the 1921 Antidumping Act and not by the Administrative Procedure Act.

## CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari be denied.

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OCTOBER, 1961.

## APPENDIX

The Administrative Procedure Act of June 11, 1946, ch. 324, 60 Stat. 237, 5 U.S.C. 1001-1011, provides in pertinent part as follows:

### DEFINITIONS

SEC. 2. As used in this Act—

(a) Agency.—"Agency" [illegible] subject to review by another agency) of the Government of the United States other than Congress, the courts, or the governments of the possessions, Territories, or the District of Columbia. Nothing in this Act shall be construed to repeal delegations of authority as provided by law. * * *

* * * * *

(c) Rule and Rule Making.—"Rule" means the whole or any part of any agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or to describe the organization, procedure, or practice requirements of any agency and includes the approval of prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing upon any of the foregoing. "Rule making" means agency process for the formulation, amendment, or repeal of a rule.

(d) Order and Adjudication. "Order" means the whole or any part of the final disposition (whether affirmative, negative, injunctive, or declaratory in form) of any agency in any matter other

than rule making but including licensing. "Adjudication" means agency process for the formulation of an order.

* * * * *

(g) Agency Proceeding and Action.—"Agency proceeding" means any agency process as defined in subsections (c), (d), and (e) of this section. "Agency action" includes the whole or part of every agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act.

PUBLIC INFORMATION

SEC. 3. Except to the extent that there is involved (1) any function of the United States requiring secrecy in the public interest or (2) any matter relating solely to the internal management of an agency—

(a) Rules.—Every agency shall separately state and currently publish in the Federal Register (1) descriptions of its central and field organization including delegations by the agency of final authority and the established places at which, and methods whereby, the public may secure information or make submittals or requests; (2) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal or informal procedures available as well as forms and instructions as to the scope and contents of all papers, reports, or examinations; and (3) substantive rules adopted as authorized by law and statements of general policy or interpretations formulated and adopted by the agency for the guidance of the public, but not rules addressed

to and served upon named persons in accordance with law. No person shall in any manner be required to resort to organization or procedure not so published.

(b) Opinions and Orders.—Every agency shall publish or, in accordance with published rule, make available to public inspection all final opinions or orders in the adjudication of cases (except those required for good cause to be held confidential and not cited as precedents) and all rules.

* * * * *

RULE MAKING

SEC. 4. Except to the extent that there is involved (1) any military, naval, or foreign affairs function of the United States or (2) any matter relating to agency management or personnel or to public property, loans, grants, benefits, or contract—

(a) Notice.—General notice of proposed rule making shall be published in the Federal Register (unless all persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law) and shall include (1) a statement of the time, place, and nature of public rule making proceedings; (2) reference to the authority under which the rule is proposed; and (3) either the terms or substance of the proposed rule or a description of the subjects and issues involved. Except where notice or hearing is required by statute, this subsection shall not apply to interpretative rules, general statements of policy, rules of agency organization, procedure, or practice, or in any situation in which the agency for good cause finds (and incorporates

the finding and a brief statement of the reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

(b) Procedures.—After notice required by this section, the agency shall afford interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity to present the same orally in any manner; and, after consideration of all relevant matter presented, the agency shall incorporate in any rules adopted a concise general statement of their basis and purpose. Where rules are required by statute to be made on the record after opportunity for an agency hearing, the requirements of sections 7 and 8 shall apply in place of the provisions of this subsection.

* * * * *

(d) Petitions.—Every agency shall accord any interested person the right to petition for the issuance, amendment, or repeal of a rule.

ADJUDICATION

Sec. 5. In every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing, * * *

* * * * *

JUDICIAL REVIEW

Sec. 10. Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion

(e) Scope of Review.—* * * In making the foregoing determinations the court shall review the

whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error.

* * * * *

The Antidumping Act of May 27, 1921, ch. 14, 42 Stat. 11, 19 U.S.C. 160-171 (1952 ed.), provided in pertinent part as follows:

DUMPING INVESTIGATION

SEC. 201. (a) That whenever the Secretary of the Treasury (hereinafter in this Act called the "Secretary"), after such investigation as he deems necessary, finds that an industry in the United States is being or is likely to be injured, or is prevented from being established, by reason of the importation into the United States of any class or kind of foreign merchandise, and that merchandise of such class or kind is being sold or is likely to be sold in the United States or elsewhere at less than its fair value, then he shall make such finding public to the extent he deems necessary, together with a description of the class or kind of merchandise to which it applies in such detail as may be necessary for the guidance of the appraising officers.

(b) Whenever, in the case of any imported merchandise of a class or kind as to which the Secretary has not so made public a finding, the appraiser or person acting as appraiser has reason to believe or suspect, from the invoice or other papers or from information presented to him, that the purchase price is less, or that the exporter's sales price is less or likely to be less, than the foreign market value (or, in the absence of such value, than the cost of production) he shall forth-

with, under regulations prescribed by the Secretary, notify the Secretary of such fact and withhold his appraisement report to the collector as to such merchandise until the further order of the Secretary, or until the Secretary has made public a finding as provided in subdivision (a) in regard to such merchandise.

SPECIAL DUMPING DUTY

SEC. 202. (a) That in the case of all imported merchandise, whether dutiable or free of duty, of a class or kind as to which the Secretary has made public a finding as provided in section 201, and as to which the appraiser or person acting as appraiser has made no appraisement report to the collector before such finding has been so made public, if the purchase price or the exporter's sales price is less than the foreign market value (or, in the absence of such value, than the cost of production) there shall be levied, collected, and paid, in addition to the duties imposed thereon by law, a special dumping duty in an amount equal to such difference.

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